The Nature of Retributive Justice and Its Demands on the State*

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Abstract: The enterprise of state punishment requires the use of limited resources for which there are other competitors, such as national defense, market regulation, and social welfare. How resource-demanding retributive justice will turn out to be depends on how retributivists answer a series of questions concerning the theory's structure. After elaborating these questions and the varieties of retributive justice that answers to them might generate, I consider the resource demands of retributive justice in the context of competing theories of distributive justice. Various tensions and outright conflicts between the pursuit of retributive and distributive justice are then explored.

Retributive theories of legal punishment hold that penal sanctions ought to be imposed on offenders in proportion with the seriousness of their crimes. Retributivists do not deny that penal sanctions might serve other purposes.[1] However, those other purposes tend to be cast by retributivists as ancillary to the main purpose of legal punishment, which is to give offenders what they deserve. Although there is a substantial scholarly literature that attempts to explicate retributivism, as well as criticize it, neither the theory's supporters nor its critics pay much attention to issues having to do with the resources that the state would have to expend in seeing to it that offenders receive the punishment

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[1] For a clear statement of this, see Michael S. Moore, "Justifying Retributivism," *Israeli Law Review* 27 (1993), pp. 15-49, at 15. See also Moore's *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997), p. 153.

that they deserve.[2] Assuming a sizeable pool of offenders, who commit an array of crimes from the least to the most serious, achieving retributive justice will be a costly enterprise. In the United States, for instance, the annual costs of the state's vast criminal justice efforts exceeds some $270 billion.[3] Granted, retributive theorists might balk at footing some of these costs, believing that the U. S. over-criminalizes conduct or over-punishes it. But even if the costs of effecting retributive justice in the U. S. could be cut by one-third or one-half, they would still be quite substantial. Further, it is well-known that many who commit crimes escape their just punishment, a fact that presumably would not sit well with most

[2] The major exception to this is Michael Cahill's "Retributive Justice in the Real World," *Washington University Law Review* 85 (2007: pp. 815-70. Cahill cogently discusses many of the issues that concern what I term the "internal structure" of retributive justice. See also Cahill's "Punishment Pluralism," in Mark D. White (ed.), *Retributivism: Essays on Theory and Practice* (New York: Oxford University Press, 2011), pp. 25-48. Others who note and discuss briefly the resource demands of retributive punishment include Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Cambridge, Mass.: Harvard University Press, 2002), pp. 308-09, and John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal* Justice (Oxford: Clarendon Press, 1990), pp. 106-08.

[3] *Economic Perspectives on Incarceration and the Criminal Justice System*, Executive Office of the President of the United States (2016), p. 7. The figure cited is for the year 2012. Document available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf (accessed September 25, 2017).

retributivists.[4] This, in turn, suggests that the cost-savings just envisioned might and perhaps should be offset by more assiduous efforts to capture and punish the deserving.

Whatever societal resources are invested in giving offenders their just deserts will, more or less inevitably, reduce the resources available to the state to provide for other important goods—national defense, market regulation, education, housing, and healthcare, to name a few. I say "more or less inevitably" for two reasons. First, it will be possible for societies to increase, to some extent, the overall pool of resources that the state has at its disposal, typically by collecting more revenue from some or all of its citizens by raising taxes. But it seems sensible to suppose that there are limits to how far the state can go by way of taxing its citizens and thereby increasing the resources available to it in the pursuit of its various purposes. Second, the nature and extent of the competition for resources among the state's responsibilities will depend on what those responsibilities are conceived to be. Theories of distributive (or social) justice posit different accounts of the state's legitimate or required purposes, and there is, at present, little agreement concerning which of these theories is the most defensible.[5] Roughly speaking, what we can say is this: the more the state is required or expected to take on, the more intense will be the competition for the limited resources it has at its disposal. This means that the state's ability to effect retributive justice will likely be impacted by this resource competition.

It is possible to deny the preceding proposition, to maintain that retributive justice must be done "though the heavens may fall." However, I doubt that most retributivists subscribe to this

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[4] See John Gramlich, "Most violent and property crimes in the U. S. go unsolved," Pew Research Center, March 1, 2017, at http://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/ (accessed September 25, 2017).

[5] For a very useful overview of the major theories, see Will Kymlicka, *Contemporary Political Philosophy*, Second Edition (Oxford: Oxford University Press, 2001).

proposition.[6] Yet there has been remarkably little discussion, among retributivists, concerning the likely resource demands of their various accounts of legal punishment, or even much recognition that meting out to offenders the punishment they deserve will require the investment of resources.[7] How many resources it requires will depend, as I argue in the second section, on the ways in which retributivists answer four kinds of questions. First, how much effort should we be prepared to have the state expend in seeing to it that offenders receive the punishment they deserve? Secondly, should the state's commitment to seeing to it that offenders are punished according to the seriousness of their offenses ever "give way" to the promotion of other goods or the avoidance of evils? Thirdly, does the urgency of the state's retributive punishment responsibilities diminish over time, such that crimes long in the past can be justifiably ignored as the state pursues current or more recent offenders? And fourthly, how harshly should we punish offenders, and what constraints, if any, should we have to observe in punishing them? The answers to these questions will determine what I term the "internal structure" of a retributive account of legal punishment. Surprisingly, perhaps, we can only guess at how most retributive theorists would answer them. Yet, the answers determine how resource-demanding the pursuit of retributive justice will be.

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[6] One who might appear to subscribe to such a view is Immanuel Kant, who asserts that even a civil society that is about to dissolve must execute "the last Murderer lying in prison…" See Kant's *The Philosophy of Law* (W. Hastie, trans.) (Edinburgh: T. T. Clark, 1887), p. 195. However, it is important to note that Kant refers only to necessity of punishing all convicted murderers, not more common and lesser offenders, including ones whose crimes might be long in the past.

[7] Again, Cahill is the major exception, in "Retributive Justice in the Real World," especially pp. 825-41. My own account of the questions that retributivists must address in arriving at an account of the internal structure of retributive justice both draws from Cahill's account and differs somewhat from it.

In the third section, the complex relationship between the internal structure of retributive justice and the often-competing demands of distributive justice is explored. I array theories of distributive justice along a continuum, from ones that assign the state a fairly limited role, to ones that envision it having many more responsibilities. Even those theorists who would assign it a modest role will have to concede the likelihood of some conflict between fulfilling that role and the achievement of retributive justice. As the role of the state increases, the potential for conflict does as well, though there are complications in this simple version of the relationship between retributive and distributive justice. What is clear is that the potential for competing demands on the state's limited resources depends on both how the internal structure of retributivism is understood and what we expect from the state in its efforts to achieve distributive justice.

One theme that emerges in both sections is worth noting. I contend that it is hard to imagine how retributivists could determine the internal structure of their theory without considering the consequences of alternative structures. Likewise, I contend that societal decisions about whether to pursue more retributive or distributive justice probably cannot be made without attending to the likely consequences of doing one rather than the other. These claims might not be welcomed by retributivists, who are generally averse to thinking that consequences—at least of certain kinds—should play much, if any role, in thinking about legal punishment.

Before proceeding to the main discussion, I note, in the first section, some of the difficulties in defining retributivism. As Mitchell Berman has suggested, there is no uncontroversial account of what constitutes retributivism.[8] I contend that most retributivists would insist that the negative deserts of offenders must play a prominent role not only in determining who should be punished, and how much, but also in justifying the institutions of legal punishment.

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[8] See Mitchell N. Berman, "Two Types of Retributivism," in R. A. Duff and Stuart P. Green (eds.), *The Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 433-57.

The Nature of Retributivism

There is an array of approaches to the justification of legal punishment that might, with some plausibility, be claimed as retributive, or partly retributive, in character. Begin with the distinction between the institution of legal punishment and the infliction of it on particular offenders.[9] At one extreme, it might be said that an approach to punishment's justification is retributive in character only if it provides the sole or perhaps primary reason for the state's setting up institutions of legal punishment *and* for inflicting it on persons whose law-breaking has been established in accordance with norms of due process. At the other extreme, an approach to punishment might be deemed at least partially retributive even if it cedes that the primary justification of having the institutions of legal punishment and for inflicting punishment on offenders is to reduce crime, while holding that punishing offenders in accordance with their negative deserts is sufficient to justify instances of punishment when crime reduction considerations fail to do so.[10] To my way of thinking, the latter approach seems a kind of residual retributivism, and thus not one that most theorists who identify themselves as retributivists would accept. In-between, although closer to residual retributivism than to full-blown retributivism, is so-called "negative retributivism," according to which offenders negative deserts constrain the pursuit

[9] See John Rawls, "Two Concepts of Rules," *Philosophical Review* 64 (1955): pp. 3-32, and H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), especially Chapter 1.

[10] Mitchell Berman suggests this version of retributivism in "Modest Retributivism," in Kimberly Kessler Ferzan and Stephen J. Morse(eds.), *Legal, Moral, and Metaphysical Truths: The Philosophy of M. S. Moore*, (Oxford: Oxford University Press, 2016), pp. 35-47, at 43.

of the institution's crime reduction aims when it comes to the infliction of punishment on persons.[11] According to negative retributivism, the institutions of legal punishment should be set up reduce crime while attempting to confine punishment to the guilty, or provably guilty, and punish them in ways that are not disproportional given the seriousness of their crimes. As Berman notes, rather than regarding negative retributivism as a genuine variety of retributivism, it might be best to view it as a form of "side-constrained consequentialism."[12]

In what follows, I will construe retributivism more boldly, as the view that the negative deserts of offenders constitutes a weighty reason not only for punishing individual offenders proportionally, but also for setting up and supporting institutions of legal punishment. I will not attempt to defend such an interpretation, or show that it, or something like it, is the view to which most theorists who regard themselves as retributivists are apt to subscribe. It is this kind of bolder retributivism, often termed "positive" retributivism, which has not been adequately elaborated in certain respects and which, depending on how it is elaborated, poses the kinds of resource-demand questions that I wish to explore. Importantly, retributivists can, I believe, allow that although satisfying the negative desert claims of offenders supplies a powerful reason for setting up the institutions of legal punishment, they might not constitute the sole reason for doing so. What other reasons might exist, and how they ought to be weighed and balanced against the reasons furnished by offenders' negative desert claims, are questions that I shall not attempt to address. Admittedly, some of the claims that I make in the next two sections about how many resources should be devoted to the pursuit of retributive justice, and how the resources so dedicated would limit the state's abilities to pursue other important aims, would have to

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[11] The classical source is J. L. Mackie, "Morality and the Retributive Emotions, *Criminal Justice Ethics* 1 (1982): pp. 3-10.

[12] Berman, "Modest Retributivism," p. 36. See also R. A. Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2011), p. 11.

be adjusted depending on a full account of the justifying purposes of having institutions of legal punishment. I shall ignore these complications.

The Internal Structure of Retributive Justice

How resource-demanding retributive justice will turn out to be depends on its internal structure. The internal structure of a retributive account of legal punishment is determined by how it answers four questions: First, how stringent are the demands of retributive justice? Second, are the demands of retributive justice absolute or merely presumptive, and if the latter, under what conditions can they be overridden? Third, are the demands of retributive justice subject to "decay?" Fourth, how much and what kinds of penalty does retributive justice require? I will construe these questions as ones pertaining primarily to the institution of legal punishment, and only secondarily to the infliction of punishment upon particular offenders. Let me elaborate each of these dimensions of retributive justice.

Again, we should understand retributivism as the view that the state has weighty reasons to set up institutions of legal punishment in order to punish deserving offenders proportionally with the seriousness of their crimes. Often, the weight of the state's reasons is taken to be sufficient to support a duty of the state to punish the deserving. However, some retributivists have disputed this understanding of the theory, so I will not build a duty to punish into my account.[13] To grasp the first question that retributivists must address in elaborating their theory—the stringency of demand to do or bring about retributive justice—it helps to think about standard agent-relative moral prohibitions such as "do not torture" or "do not coerce."[14] Set aside, for the moment, the question of whether these

[13] See Cahill, "Retributive Justice in the Real World," p. 851.

[14] For illuminating discussion of the character of such prohibitions, see Moore, *Placing Blame*, pp. 680-88.

prohibitions can ever be overridden, such that torturing or coercing others can be, all things considered, justified or, perhaps, excused. How resource-demanding the observance of these prohibitions will be varies considerably, depending on the projects or purposes of the agents to whom they apply. It might be that an agent has no ends or purposes that would be served by torturing or coercing others, in which case, observing the prohibitions will be relatively easy for, if not entirely costless to, the agent. Alternatively, some agents might have ends or purposes that would be served by such acts. Even if that is true, there will be significant variations in the time, energy, or effort required of agents to achieve their purposes while honoring the prohibitions. Some agents might have to exert only a little effort to achieve their ends without resorting to torture or coercion; others might have to exert quite a bit of effort to do so. Moreover, it will often be possible for agents whose purposes would be served by coercion or torture to avoid having to exert any effort in observance of the prohibitions simply by abandoning the projects or purposes that led them to consider torturing or coercing others in the first place.

The state's responsibility to punish the deserving, by contrast, does not involve the state going about its business while observing the kinds of side-constraints that moral prohibitions on torture or coercion consist in. Instead, if the state is to punish criminal wrongdoers proportionally with the seriousness of their crimes, it must take action and thus invest some of its (typically) limited resources in investigating crimes, tracking down suspects, charging, convicting, and, finally, punishing them. The state might have some latitude in how it goes about accomplishing these tasks, but it is exceedingly unlikely that there will be a resource-free way to accomplish them. Also, retributivists are rather unlikely to believe that the state is at liberty to abandon these tasks and take up other ones instead. Put

differently, retributive theorists will resist the notion that state punishment of the deserving is something that it does, or does not do, entirely at its own discretion.[15]

Yet if state punishment of the deserving is, of necessity, resource-demanding, the question that naturally arises is to what extent the state should be prepared to invest its limited resources in accomplishing this task. Should it go "all out," as it were, in attempting to capture and punish the guilty according to their ill-deserts, even if doing so would consume a substantial portion of the resources that it has on hand to accomplish all of its various tasks? Or should the state be willing to expend a substantial portion of its resources to achieve retributive justice, though keeping an eye on its expenditure levels for this purpose in order to conserve some for its other purposes, whatever those turn out to be? A third rough alternative is also conceivable, though one suspects it will not be an attractive one to some retributivists. It would have the state expend relatively modest resources on retributive justice, while conserving the bulk of its resources for other purposes.

It is natural to suppose that the stringency of retributive justice, understood as the intensity of the demand that the state exert resources in its pursuit, varies with the seriousness of the crimes with which it is confronted. The state ought to be prepared to use more of its resources to capture and punish felons, and perhaps serious felons, than misdemeanants. Still, it is conceivable that retributivists might subscribe to some notion of invariant stringency, according to which whatever level of effort by the state to capture and punish the deserving is deemed necessary in nowise depends on the seriousness of criminal offenses.[16] Invariant stringency would require the punishment of all crimes to be

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[15] Although Douglas Husak insightfully discusses this and other issues in "Why Punish the Deserving?" *Noûs* 26 (1992): pp. 447-64

[16] The contrast between variant and invariant stringency is noted by Cahill in "Retributive Justice in the Real World," at 829.

pursued with equal gusto, although how much "gusto" that would involve could conceivably be high, medium, or low.

A second factor that will determine the internal structure of retributive justice, and thus the intensity of its resource demands, is the possibility of "decay" in the stringency of the state's required efforts to punish the deserving. The state does not confront a static number of criminal offenses from among which it must allocate its apprehension, prosecution and punishment efforts. Instead, crimes continually occur and eventually recede into the past. Some are resolved quickly by the authorities, in the form of arrests, charges, convictions, and sentences. Others are not quickly resolved or resolved at all. The question this raises is whether the stringency of the state's duty to punish the deserving decays over time.[17] As unsolved crimes recede into the past, and sometimes into the distant past, should the state expend fewer of its limited resources in investigating and prosecuting them? And does such decay affect all unsolved crimes equally or is it slower, or non-existent perhaps, for more serious crimes? It seems natural to think that there is some decay in the required stringency of the state's efforts to punish the deserving, and more so when the crimes in question are less serious.[18] It would be odd, for instance, for state officials to announce a new program to pursue vigorously the investigation and prosecution of bicycle thefts from five, ten, or fifteen years ago. Even with serious crimes like homicide,

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[17] So-called "statutes of limitation" in the law serve a variety of purposes, most of which seem largely distinct from what I term "decay." For discussion, see J. Anthony Chavez, "Statutes of Limitation and the Right to a Fair Trial," *Criminal Justice* 10 (1995): pp. 2-51; Tyler T. Ochoa and Andrew Wistrich, "The Puzzling Purposes of Statutes of Limitation," *Pacific Law Journal* 28 (1997): pp. 453-514; and Andrew J. Wistrich, "Procrastination, Deadlines, and Statutes of Limitation," *William and Mary Law Review* 50 (2008): pp. 607-67.

[18] Statutes of limitation on the prosecution of crimes often make exceptions for the most serious offenses. See Chavez, "Statutes of Limitations and the Right to a Fair Trial," p. 3.

the authorities are apt to invest fewer and fewer resources in solving them and punishing the perpetrators of them as time goes by. However, we can conceive of forms of retributive justice that admit of no decay in the stringency with which the authorities ought to pursue convictions for past crimes, although this is consistent with admitting variable stringency across crime types. Opponents of decay might concede that often there will be practical difficulties in gaining convictions as crimes recede further into the past, as witnesses to them will disappear or die, or their memories will become hazy. But they might insist that this shows nothing about the stringency with which the authorities ought to pursue convictions. Time changes nothing, they might say, about the urgency with which state authorities should pursue and punish the deserving.

A third factor that will determine the internal structure of retributive justice, one that might be confused with stringency, has to do with whether the state's responsibility to punish the deserving is absolute, presumptive, or readily subject to trade-offs of various kinds. For instance, Michael Moore defends a version of what he terms "threshold deontology," according to which the duty to inflict deserved punishment on offenders can be overridden in exceptional cases if the consequences of failing to do so would be disastrous.[19] This means, I take it, that Moore rejects the notion that the duty to punish is absolute, subject to no exceptions whatsoever. Even if one sides with Moore in believing that the duty of the state to punish the deserving is strongly presumptive, without being absolute, one still has to specify the conditions under which the presumption can be overridden. Presumably, the criteria for such exceptions should be specified as clearly as possible in the institutional rules, or else officials will be left to craft them in an ad hoc manner. Assuming that Moore would concede this point, his account of when the duty to punish can be set aside is only one such account; other retributivists might

[19] Moore, *Placing Blame*, p. 158, and again at pp. 719-24. Moore's threshold deontology has been criticized as unsustainable by Larry Alexander in "Deontology at the Threshold," *San Diego Law Review* 37 (2000): pp. 893-912.

offer alternative accounts, ones that make it somewhat easier to override the presumptive duty to pursue punishment of the deserving. It will be useful, in this context, to distinguish "internal" from "external" trade-offs. Internal trade-offs involve accepting less in the way of deserved punishment for one or more offenders in order to effect the deserved punishment of other (and sometimes more serious) offenders. Moore is prepared to accept such internal trade-offs, but only when they would enable us to effect much more deserved punishment.[20] Further, he might insist that we should only accept them under conditions of necessity, when there is no other way, regardless of how many resources that we are prepared to invest, to effect the punishment of some very serious offenders.[21] Yet other retributivists might accept such internal trade-offs more readily—simply to conserve resources, or perhaps substantial resources, which would then have to be used in the pursuit of retributive justice.

External trade-offs, by contrast, involve accepting less punishment of the deserving, or perhaps no punishment of them at all, in order to promote goods other than deserved punishment, or, more convincingly, in order to avert substantial harms of other kinds. Suppose, for instance, that someone has committed a serious crime, has been arrested charged, and convicted of it, but that he or she is very popular, perhaps a powerfully influential political leader. If the state proceeds to exact retributive justice from this offender, his or her partisans will take up armed resistance which will, in turn, lead to the injuries or deaths of many innocent people, along with massive property destruction which the state will be largely helpless to prevent. Should the state forego punishment of the deserving offender in order to avert this disaster? Retributive theorists could conceivably answer this question in the affirmative,

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[20] Moore, *Placing Blame*, p. 158.

[21] Moore, *Placing Blame*, p. 158, claims that we should reject forgoing the punishment of some deserving offenders in order to punish other deserving ones "except when it is needed to punish some very deserving criminal(s)." This suggests that he accepts something like a "necessity" condition for trade-offs.

though they might vary somewhat in characterizing the qualifying conditions for permitting punishment institutions to accept such external trade-offs. Some might insist on something akin to a necessity condition, according to which such trade-offs are permissible only when the state lacks other means to prevent the violence that it fears will result from fulfilling its responsibility to punish. Others might be willing to ease the state's responsibility to punish if fulfilling it would require the state to invest quite substantial resources in averting or quelling the predicted unrest.

It is conceivable that some retributivists might accept internal trade-offs under certain conditions while wholly eschewing external ones; retributive justice might be traded off against retributive justice but not for other goods, or the avoidance of evils. A further question would be whether the conditions for permitting trade-offs vary with the severity of the crimes involved. Should state officials be more reluctant to accept trade-offs of any kind when doing so would result in less or no punishment of very serious offenders, but more willing to accept them when the offenders who would receive less or no punishment are guilty of lesser crimes?

The stringency of retributive justice, and the absolute or presumptive character of the state's duty to punish the deserving (or put differently, the strength of its reasons to punish the deserving), are different. The former has to do with how many resources the state should be committed to expending in apprehending, convicting, and punishing offenders. The latter has to do with whether, in some cases, the state should be prepared to reduce or leave off punishment of the guilty if they can thereby effect significantly more retributive justice, or avoid bad consequences of particularly significant kinds. It is possible to hold that state officials should always be prepared to invest considerable resources in punishing the guilty, while also conceding that they should be prepared to accept some internal or external trade-offs in certain kinds of cases after the state has invested the requisite level of resources in them. Presumably, trade-off cases will be relatively rare, whereas the necessity of expending some resources or other on capturing, convicting and punishing the deserving will be present in all cases.

A fourth dimension of retributive justice concerns the kinds and severity of legal punishment, as well as the constraints on it. How harshly should crimes of various kinds be punished, and using what kinds of legal sanctions? The imprisonment of offenders is often taken to be the norm, yet many lesser crimes might be, and often are, punished with non-custodial sanctions. Where do retributivists locate the line between imprisonment, which is expensive, and non-custodial sanctions, which tend to be less expensive? There is room for variation among retributivists in answering this question. Also, how lengthy should custodial, or even non-custodial, sanctions be in order to effect retributive justice for the various kinds of offenses? The answer to this question likely depends on the solution, if there is a solution, or a single one, to what Andrew von Hirsch has termed the "anchoring problem."[22] We might be able to reach some consensus on the ordinal ranking of crimes according to their seriousness. Notoriously, however, such a ranking is consistent with a variety of sanction severity scales that vary in their harshness. For our purposes, what matters is that the harsher the retributive sanction scale turns out to be, the more resources its implementation will require. Then, there is the further question whether criminal sanctions must be constrained by other moral values. It can be argued that retributivists must reject sanctions that degrade offenders by turning them into beings who are less or no longer responsive to moral considerations.[23] If this is correct, then observing this constraint might require societal investment in forms of legal punishment that are more rehabilitative, or at least less damaging to the moral capacities of offenders. Yet, such sanctions might be more costly to implement.

Taking these four factors—stringency, decay, trade-offs, and the severity and limits on penal sanctions—into account, we can array forms of retributive justice along a continuum from the most to

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[22] Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993): pp. 18-19, and "Proportionality in the Philosophy of Punishment," *Crime and Justice: A Review of Research* 16 (1992): pp. 55-98, at 79-83.

[23] See Richard L. Lippke, *Rethinking Imprisonment* (Oxford: Oxford University Press, 2007), pp. 113-15.

the least resource-demanding.[24] At the most resource-demanding end of the continuum will be what we might term "extreme retributivism." According to it, the state's responsibility to punish the deserving involves high and invariable stringency, is not subject to decay, and is absolute, meaning that it should never be traded off in the pursuit of more retributive justice or other goods (including the avoidance of very bad consequences). If we imagine this combined with a fairly harsh sentencing scale, though one that must ensure that offenders are not degraded by their sentences, then the costs of retributive justice will be formidable. At the other end of the continuum will be what we might term "mild retributivism." According to it, the state's responsibility to punish the deserving would involve low levels of stringency, perhaps vanishing to near zero in cases of minor offenses, substantial decay regardless of the nature of the crimes in question, and the responsibility to punish would be presumptive only, routinely subject to both internal and external trade-offs. Combining this with a mild sanction scale, which might in turn reduce the resources that would have to be expended on keeping sanctions non-degrading, would produce a retributive punishment regime that would be eminently affordable. Mild retributivism would treat the state's responsibility to punish the deserving as of relatively lesser import, compared, perhaps, with its other responsibilities.

It seems doubtful that most retributive theorists would understand themselves to be either extreme or mild retributivists. The former approaches to retributive justice are too harsh and unyielding; the latter too pliable and undemanding. But the fact is that few, if any, retributivists lay out their positions with great care by reference to the kinds of factors I have identified as determinative of the

[24] There might be a fifth factor, at least if retributivists were to take seriously Moore's suggestion that all moral wrongs might be appropriately criminalized and punished. See *Placing Blame*, p. 187. If the reach of the criminal law were to be extended this far, then the state would be kept very busy indeed tracking down and punishing "offenders." In fairness to Moore, he quickly suggests that such robust legal moralism ought to be constrained by other values.

internal structure of retributive justice. Moore, as we have already seen, accepts limited internal trade-offs and also seems to accept limited external ones.[25] His positions on stringency and decay are less clear.[26] He has said, more recently, that retributive justice should not be pursued at all costs, that its demands on the state will have to be weighed against other demands, including those of distributive and corrective justice.[27] This suggests that he would be apt to accept version of stringency and decay that would leave the state with more resources to fulfill its other responsibilities. At the very least, Moore's position on some of the factors that determine the internal structure of retributive justice can be discerned. This is not true with many other retributive theorists, who seem mostly focused on the narrow question of explaining why the state should punish the deserving.

The theorist who is most cognizant of the factors that determine the internal structure of retributive justice is Michael Cahill. Cahill opts for what he terms "consequentialist retributivism," according to which the state has no duty to pursue retributive justice.[28] Instead, meting out punishment to the deserving is a goal that the state is to pursue with an aim to maximizing the overall quantity of it. Cahill readily embraces a form of variable stringency, in that he admits that the authorities might spend more resources pursuing the punishment of more serious crimes than less serious ones, because doing so might yield more overall deserved punishment. Of course, equally, it might not, since sometimes capturing, convicting, and punishing more serious offenders might prove very resource-demanding.

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[25] See Moore, "Justifying Retributivism," pp. 48-49, where he discusses trading off the punishment of very minor wrongs in order to achieve goods like pluralism, tolerance, and autonomy.

[26] Cahill suggests, plausibly, that Moore would have the state pursue serious offenders more assiduously than less serious ones. See his "Retributive Justice in the Real World," pp. 850-51.

[27] See Michael S. Moore, "Responses and Appreciations," in Ferzan and Morse, *Legal, Moral, and Metaphysical Truths*, pp. 343-427, at 345-48.

[28] Cahill, "Retributive Justice in the Real World," pp. 850-53.

Perhaps the authorities would better allocate their limited resources by focusing on lesser offenses, which might be less costly to process and punish. Cahill does not discuss the possibility of decay, but a sympathetic reading of his position suggests that he would admit some form of it. After all, the authorities might best employ their limited resources in pursuing the punishment of more recent offenses, ones for which the evidence is fresher or, perhaps, more likely to discovered. For Cahill, the question whether the state's duty to punish the deserving is absolute or presumptive is meaningless. Since there is no duty to punish the deserving in the first place—doing so is simply a goal for the state to pursue—there is no deontological moral constraint to be possibly overridden. Cahill is clear that he accepts what I have termed "internal trade-offs," such as prosecutors accepting guilty pleas to charges that will produce less-than-deserved punishment for some offenders in order to gain more deserved punishment of other offenders.[29] It is not clear how Cahill could reject what I have termed "external trade-offs," given the likelihood that he would have to admit that there are other intrinsic goods besides retributive justice that the state might pursue and that would thus provide occasions for trade-offs.

Cahill's consequentialist retributivism would be moderate in its demands on the state's limited resources; that much seems clear. What is less clear is whether it is credible form of retributive justice. If retributive justice is simply one intrinsic good, and indeed one among many that the state might pursue, what is to prevent the state from slighting it in the pursuit of these other intrinsic goods?[30] It is hard to see how Cahill's account can make sense of the urgency of the state's pursuing the guilty and meting out to them the punishment that they deserve. Also, as David Dolinko has noted, from the mere fact that X is an intrinsic good, not only does it not follow that the *state* has any duty to pursue it (as Cahill

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[29] Cahill, "Retributive Justice in the Real World," pp. 855-56.

[30] David Dolinko, "Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment," *Law and Philosophy* 16 (1997): pp. 507-28, at 514.

concedes), it might not follow that the state has any reason to do so.[31] Friendship, love, and happiness are all intrinsic goods, but it is doubtful that the state has any reason to pursue or attempt to maximize them. How is retributive justice, as an intrinsic good, any different? Put differently, why is it that deserved punishment claims are ones that it is an urgent responsibility of the state to pursue, when other kinds of desert claims—to the grades students merit because of their work in high school or college courses, or to the promotions or raises employees have earned in the workplace—are not ones that the state is directly responsible for realizing?[32] Cahill might argue that the interests that the state seeks to secure through enforcement of the criminal law are foundational in the lives of individuals—goods that they must have if they are to pursue and enjoy other goods.[33] Also, he could argue that the state is in a better position to protect and promote such goods than it is to promote and protect other intrinsic goods. The pursuit of other intrinsic goods might be best left to individuals or private organizations. Yet all of this suggests that the quest for retributive justice should have a more elevated role than Cahill's relegation of it to one intrinsic good among others supplies.

My sense is that the most plausible account of retributive justice would be one that holds that the state has a duty to punish the deserving proportionally with the seriousness of their crimes, a duty that varies in stringency, is subject to decay, (although perhaps variable decay, in that the duty to punish the most serious offenders decays more slowly, or, perhaps, not at all in the cases of the most serious offenders), and is subject to both internal and external trade-offs under quite limited conditions. If such

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[31] Dolinko, "Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment," pp. 518-19.

[32] Husak presses a similar point in "Why Punish the Deserving?" pp. 450-51. However, Husak's account emphasizes the costs and hazards of legal punishment, rather than the more pressing problem of retributivists explaining why the state is supposed to invest massive resources in seeing to it that some desert claims are satisfied but not, apparently, to see to it that others are.

[33] Cf. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 62.

an account can be combined with a relatively mild sentencing scale, one that would not impose degrading sanctions on offenders, it would be moderate in its resource demands, at least compared with extreme retributivism. Having said this, I am not sure how one would go about defending this moderate version of retributive justice. I am especially unsure of how one would do this without some appeal to the consequences—good and bad—of adopting more or less demanding versions of retributive justice. In other words, why would one be concerned about the resource-demandingness of more extreme forms of retributivism unless one was contemplating competing demands for limited state resources and the need to satisfy them? Fortunately, for my present purposes, I can set these questions aside. We do not need an elaborated and fully defended account of retributive justice to begin to see how its demands might interact with the demands of distributive justice.

Retributive and Distributive Justice

There is, of course, no widely agreed-upon theory of distributive justice and the state's role in fulfilling its requirements.[34] For the purposes of this discussion, I shall limit my purview by positing a continuum of views about distributive justice that range from libertarian or minimal state views, at one extreme, to strongly egalitarian schemes that nonetheless incorporate capitalist forms of economic organization and production. In discussing the views along this continuum, I shall have to simplify

[34] Full discussion of the tensions that might exist among the state's promotion of forms of justice would have to encompass its role in ensuring corrective justice, especially in the form of providing courts in which civil remedies for torts or other kinds of private wrongs could be pursued by individuals. Although I concede this point, my sense is that demands on the state's resources deriving from its role in ensuring corrective justice will be less pronounced because the state's role is more passive in this arena.

matters considerably. This should not matter so long as the broad outlines of competing views, and their likely implications for the achievement of retributive justice, can be discerned.

On the minimal state views, the government's role is to provide forms of both internal and external security for the lives, liberty, and property of citizens, with only modest economic regulation, mostly taking the form of enforcing contracts along with some attention to controlling the negative effects of market externalities.[35] If we imagine internal security in the form of a streamlined criminal law and its enforcement, then the primary sources of competition for government resources on minimal state views will be provision for external security, presumably in the form of the military, and whatever modest government economic regulation minimal statists support. As we move toward the middle of the distributive justice continuum, greater economic regulation becomes the norm, along with various forms and levels of social welfare provision.[36] The extent and kinds of economic regulation and the social welfare provisions endorsed vary, depending on the theory in question. But whatever additional

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[35] Representative minimal state accounts, many of which identify themselves as libertarians, include Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988); Loren E. Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987); Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Oxford University Press, 1998); and Richard A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (New York: Basic Books, 2002).

[36] Contemporary welfare liberals, some of whom verge over towards egalitarianism, include Rawls, *A Theory of Justice*; Ronald Dworkin, *Sovereign Virtue: Equality in Theory and Practice* (Cambridge, Mass.: Harvard University Press, 2000); Philippe von Parijs, *Real Freedom for All: What (If Anything) Can Justify Capitalism?* (Oxford: Oxford University Press, 1995); and Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, Conn.: Yale University Press, 1980).

state activities are proposed will have to be allocated resources, which allocations will compete with those employed in the pursuit of retributive justice.

At the other end of the continuum from minimal state conceptions will be ones that are strongly egalitarian. These will typically incorporate robust social welfare provisions of various kinds, ranging from subsistence to education, health care, housing, childcare services, eldercare, and provisions for the disabled. Also, egalitarian societies will maintain high minimum wages, aggressively check the formation of unreasonable market power, and retrain workers whose jobs have disappeared, support them while they are unemployed, and relocate them, if necessary.[37] In order to provide this range of services and welfare support, egalitarian societies will likely have to redistribute resources from their better off citizens to their less well-off ones. Doing so will also keep substantial social and economic inequalities in check, itself a desirable feature of society for egalitarians given the link between wealth and political influence.

Given this brief sketch of distributive justice alternatives, what are their implications for the kinds of retributive justice surveyed in the previous section? Start with the minimal state conceptions. On the one hand, the governments of minimal states will face relatively few competitors for its limited resources. On conceptions of the just society according to which providing for external and internal security largely exhausts the state's responsibilities, there might be more resources available to accommodate some of the more extreme forms of retributive justice. Granted, maintaining an effective external security force will cost minimal state societies a substantial amount. Precisely how much it will

[37] Egalitarians include Kai Nielsen, *Equality and Liberty: A Defense of Radical Egalitarianism* (Totowa, N. J.: Rowman and Allanheld, 1985); G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass.: Harvard University Press, 2008); Amartya Sen, *Inequality Reexamined* (Cambridge, Mass.: Harvard University Press, 1992); and John E. Roemer, *Equality of Opportunity* (Cambridge, Mass.: Harvard University Press, 2000).

cost them probably cannot be determined in the abstract, as it will depend on how many and what kinds of potential enemies such states have, which will depend, in part, on whether minimal states are attractive targets for invasion by other states. But at least minimal states will have to concern themselves only with maintaining sufficiently threatening and capable military forces, not, in addition, having to provide for extensive market regulation and social welfare provisions.

On the other hand, it might be a mistake to assume that minimal statists would happily endorse spending the kinds of resources on retributive justice that the more extreme forms of it would require. It might not go against the logic of minimal state conceptions to tax its citizens more heavily to achieve an effective military and to assiduously pursue and punish all contemporary and historical offenders in accordance with what they deserve, allowing for few, if any trade-offs. But minimal statists nonetheless tend to prefer less taxation to more taxation, and a smaller state to a larger and more active one. These preferences might lead them to opt for forms of retributive justice that incorporate variable stringency, decay, and trade-offs. [38] It is important to note, though, that minimal statists would likely insist upon a streamlined criminal law, one without the legal paternalist or legal moralist elements that are familiar in so much "vice crime."[39] The police, prosecutors, and courts would have considerably less "crime" to concern themselves with in minimal state societies, and that might make it possible for minimal statists to opt for more demanding forms of retributive justice. Still, the general unease with government that minimal statists exhibit might seem to cohere better with more moderate versions of retributive justice.

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[38] Some minimal statists eschew standard forms of retributive justice, opting instead for requiring offenders to compensate victims in lieu of undergoing other forms of penal hard treatment. See Barnett, *The Structure of Liberty*, pp. 216-37.

[39] This is certainly true for minimal statists with libertarian leanings. See, for instance, Barnett, *The Structure of Liberty*, pp. 200-206.

As we increase the state's market regulatory and welfare functions, it is natural to think that the prospect of greater competition for the state's limited resources will impel retributive thinkers towards moderate forms of retributive justice. If the state has to expend more resources regulating the market, smoothing its sharp edges, and providing welfare benefits to those who, for one reason or another, cannot work or find work, it will presumably have fewer resources on-hand to pursue the deserved-punishment of minor offenders or even serious ones whose crimes have receded into the past. Of course, given the greater willingness of welfare liberals and egalitarians to tax the more affluent to provide for the needs of the less affluent, we can imagine forms of these theories being combined with extreme forms of retributive justice. However, it seems more sensible to assume some upper limit on the resources that the state can call upon to pursue the diverse functions it has in welfare liberal or egalitarian societies. That, in turn, means that the pursuit of retributive justice will likely remain in some tension with the performance of the social welfare or market regulatory functions of the state, not to mention the need to maintain adequate external security forces. This tension might be eased somewhat if welfare liberals or egalitarians are willing to rely on families or other civic groups to assume significant social welfare roles, with the state functioning as more of a back-up provider of last resort.[40]

Welfare liberals and egalitarians might argue that the competition among market regulation, social welfare, external security, and retributive justice for the state's limited resources is not as stark as I have portrayed it. More specifically, some of them will maintain that state spending on social welfare, insofar as it reduces social deprivation and promotes things like education and mental health care,

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[40] Michael Cavadino and James Dignan term "conservative corporatist welfare states" those in which the family and churches assume central welfare roles. See their *Penal Systems: A Comparative Approach* (London: Sage Publications, 2006), p. 17. As Cavadino and Dignan note, such societies might tend to devalue women somewhat, since they will disproportionately fulfill the requisite welfare roles.

might work to reduce criminal offending. Not only will a welfare floor lessen the felt-need to commit crimes to eke out a living, but the myriad negative effects of social deprivation on citizens' capacities for morally responsible conduct will be ameliorated.[41] Also, if the state is proactive about helping individuals who have lost their jobs due to capital flight or changing production techniques, this will reduce the desperation of the dispossessed. To be clear, welfare liberal and egalitarian theorists do not favor social welfare and more active government in order, simply, to keep crime in check. Presumably, they favor them because such measures enable all citizens to achieve some normative baseline of decent, independent lives. Indeed, achieving this baseline might require welfare liberals and egalitarians to support social welfare and market regulatory mechanisms that do more than keep criminogenic social conditions in check. Still, liberal and egalitarian theorists could make credible arguments that societal spending on welfare provisions and market regulation would reduce the need for retributive justice

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[41] The classic statement is Jeffrie G. Murphy's in "Marxism and Retribution," *Philosophy & Public Affairs* 2 (1973): pp. 217-43, though Murphy's account is somewhat ambiguous between holding that social deprivation is criminogenic and holding the severe forms of it undermine the state's authority to pursue retributive justice. A very useful discussion of social deprivation and the criminal law is provided by Stephen J. Morse in "Deprivation and Desert," in William C. Heffernan and John Kleinig (eds.), *From Social Justice to Criminal Justice: Poverty and the Administration of the Criminal Law* (New York: Oxford University Press, 2000), pp. 114-60. Many of the other essays in the Heffernan and Kleinig volume are likewise instructive. See also Richard Delgado, "'Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?" *Law and Inequality* 3 (1985): pp. 9-90. For a recent, valuable discussion, see Stuart P. Green, "Just Deserts in Unjust Societies: A Case-Specific Approach," in R. A. Duff and Stuart Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 352-76.

activities by the state. If this is correct, then resources expended on the former need not take away from the state's ability to mete out to offenders the punishment they deserve. This might open the door, at least, for the adoption of more resource-demanding forms of retributive justice.

A more radical tack might be taken by some egalitarian theorists. They might argue that, in the absence of social welfare and market regulatory actions by the state that raise all citizens above some normative baseline of well-being, retributive justice lacks all legitimacy.[42] Legal punishment, it might be claimed, cannot "do justice" or give lawbreakers what they deserve if insufficient social justice exists or if minimal conditions of persons deserving punishment are not satisfied. Such conditions might not be satisfied if severe social deprivation reduces citizens to desperation or wholly undermines their capacities for responsiveness to the moral reasons they have to abide by the criminal law. On such an account, market regulatory and social welfare provisions, at least up to some level, are not simply in conflict with the resource demands of retributive justice. Instead, they are preconditions of the coherence of retributive justice. In the absence of such market regulatory and social welfare provisions, the state might apprehend and punish lawbreakers, but there would be no sense in which its doing so would constitute the pursuit of retributive justice. Such a line of argument is consistent with disagreements among theorists about the level of social justice sufficiency that must be met before legal punishment constitutes retributive justice. As a practical matter, there would also be the further, difficult question whether a given society's institutions and practices have attained that level of social justice sufficiency.

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[42] Murphy, towards the end of "Marxism and Retribution," seems to suggest this more radical approach, at 241-43. For doubts about the legitimacy of state punishment in circumstances of severe social and economic exclusion, see R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), pp. 181-201.

As we have already seen, the tensions that exist among the state's various functions are not static. More resources might have to be spent on funding the military in times and circumstances in which a society's physical or economic security are threatened. Similarly, the demands on the state's welfare institutions, if they exist, will vary depending on such things as influxes of immigrants, downturns in the economy, or baby booms. Demands on the resources needed to fight crimes and bring offenders to justice are likewise not fixed, as crime can increase or decrease due to a variety of social, cultural, or economic factors. Theories of social justice provide abstract templates, of sorts, for thinking about what functions the state ought to perform, at what levels, and according to what priorities. But applying such templates to the practical problems raised by limited state resources will likely require officials to weigh the consequences of utilizing more of the resources at their disposal to fulfill one or more of the state's normative functions at the expense of others. This will especially be true given the variations in need for the goods that these state functions are designed to secure. For instance, state officials can respond to increases in crime by devoting more resources to policing, the courts, and corrections. Alternatively, they can respond to increases in crime by devoting more resources to social welfare or job creation. Or state officials can try to do both, though this might put a strain on the resources available to provide for national security. Theories of distributive justice will offer guidance in thinking about how to approach and resolve these apparently competing demands. But I doubt that they can fully resolve them without some weighing of the likely consequences of spending more on the fulfillment of one state function as opposed to another or others. And into this mix of considerations would likely come the debate about how to interpret the internal structure of retributive justice, and the consequences of adopting extreme versus more moderate forms of it. Yet for retributivists who are generally averse to consequentialist thinking about their theory and its implications, the suggestion that they probably cannot avoid doing so will be greeted with some unease.[43]

[43] Though as we have seen, not all retributive thinkers are uneasy with consequentialism. Cahill, in

The suggestion that we likely cannot determine the character of retributive justice without considering the consequences of adopting one form of it rather than another, in the context of demands on the state to provide for competing goods that vary in their "neediness," might be resisted. Extreme retributivists might claim that the demands of retributive justice have a kind of absolute priority over the other goods that it is the responsibility of the state to provide, whatever those (depending on one's theory of distributive justice) turn out to be. On such a view, there will be no conflict between the good of retributive justice and the other goods that it is the state's responsibility to ensure. Doing retributive justice will have precedence; whatever resources remain afterwards can go to the provision of the other, apparently lesser, state functions. Yet such an approach does not seem tenable, even for minimal state theorists who strictly limit the functions of the state. For instance, it seems doubtful that the value of punishing all past and present offenders according to the seriousness of their crimes should have precedence over providing for the external security interests of citizens, regardless of the number and kind of the threats to those interests. Doing retributive justice is not that important. Moreover, as we have seen, some distributive justice theorists reject the possibility of the state's enacting retributive justice in the absence of sufficient provisions for social welfare and market regulation. On these accounts of social justice, it will make no sense to inflexibly privilege the pursuit of retributive justice over the state's social welfare and market regulatory functions.

Alternatively, some retributivists might try to make some headway in establishing the priority of retributive justice over other justice considerations by claiming that while giving offenders the punishment they deserve is an intrinsic good, education or healthcare or even national security are only instrumental goods, and thus presumably lower in the pecking order of state-supplied goods. I strongly

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"Retributive Justice in the Real World," embraces it, at 861-70. Moore discusses the possibility of consequentialist retributivism, though without endorsing it. See his *Placing Blame*, pp. 156-59.

doubt that this line of argument will succeed. Not only are there the questions, alluded to earlier, about why the state has some special responsibility to pursue the intrinsic good of retributive justice that it apparently lacks with respect to other intrinsic goods, but the attempt to relegate things like subsistence, education, healthcare, and external security to the category of "merely" instrumental goods seems wholly unconvincing. They are not like cars or cellphones or even money, things which are clearly instrumental goods. Instead, they are foundational goods that make human agency possible or make possible the enjoyment of minimally decent and independent lives.[44] As such, subsistence, education, healthcare, and external security seem no less morally significant than the "good" of retributive justice and might seem rather more important than it in many cases of minor criminal offending.

Concluding Remarks

In the course of the preceding discussion, I have suggested that retributivists might have to take into account consequentialist considerations at two junctures: in making choices about how to conceive of the internal structure of retributive justice and its potential resource-demands, and in thinking about how to allocate state resources as between the pursuits of distributive justice and retributive justice. In particular, it is not apparent how state officials, faced with questions about how to allocate the limited resources at their disposal, can do so sensibly without considering the consequences, complex though they might be, of investing more, or less, in the pursuit of retributive justice.

The idea that retributivists might have to admit some role for consequences in their accounts of legal punishment is not a new one.[45] Some retributivists might refuse to accept this notion, dogmatically

[44] See, for instance, Rawls, *A Theory of Justice*, and his notion of "primary social goods," pp. 90-95.

[45] Again, see Husak, "Why Punish the Deserving?" p. 450.

insisting on unyielding forms of the duty to vigorously track down and punish the guilty, regardless of the seriousness of their crimes. But I doubt that most would do so. As I have suggested, what unites retributivists is a commitment to the notion that the state ought to design and administer institutions of legal punishment, at least in significant part, to ensure that criminal offenders are visited with sanctions that accord with their negative deserts. Precisely how the state does this—with what focus and intensity—seems a matter concerning which retributivists can and do disagree to some extent.